(12) (12)

Nos. 98-1701 and 98-1706

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE ET AL.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE ET AL.

On Writ Of Certioarri To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI PUGET SOUND STEAMSHIP OPERATORS ASSOCIATION AND CHAMBER OF SHIPPING OF BRITISH COLUMBIA IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI[1,2]

A. *Amicus*, Puget Sound Steamship Operators Association ("PSSOA"), is a nonprofit, membership, trade association headquartered in Seattle, Washington. Its membership is comprised of 33 maritime companies which own, operate or are agents for all types of vessels serving the State of Washington and the Pacific Northwest, including container ships, break bulk vessels, passenger ships, general cargo vessels, auto carriers, tugs, petroleum tankers, etc.

PSSOA member companies service, represent or operate cargo vessels that make approximately 2,300 voyages each year to Washington ports on Puget Sound, Washington's main estuary, and to Grays Harbor on its Pacific Coast, comprising approximately 75% of all cargo vessels calling those ports. PSSOA vessels handle about U.S. $58 billion of trade in-bound to consignees in the United States, Canada and elsewhere or out-bound to foreign ports, primarily in Asia. Port of Seattle trade statistics show the State of Washington ranks as the number three state in the Union in maritime international trade in terms of dollar value.

Related specifically to oil carriage, PSSOA members represent about 90 tank ships, making approximately 237 voyages per year to, from, or in Puget Sound. Over half

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[1] Consent to file this brief in support of the United States and Intertanko was obtained from all parties.

[2] This brief was authored in whole by counsel for *amici curiae* and no party other than amici have made a monetary contribution to its preparation or submission.

of these voyages are by U.S. flagged tankers. All tankers, wherever flagged, call at five major oil refineries located in the ports of Ferndale, Anacortes or Tacoma, or at product terminals at Manchester or Seattle's Harbor Island, all situated on Puget Sound in the State of Washington.

PSSOA's mission is to promote growth and development of marine commerce in Puget Sound, Grays Harbor and other ports through strong business leadership that encourages sustained maritime trade in concert with modern principles of environmental stewardship. PSSOA, seeking to maintain a competitive balance, strives to eliminate factors unreasonably or unnecessarily increasing costs and complexities of transacting maritime business in Washington.

PSSOA works closely with other trade associations serving similar vessels calling at ports in British Columbia via the Strait of Juan de Fuca and at ports on both the Oregon and Washington side of the Columbia River, which divides the two states. Some vessels call at Oregon, Washington and Canadian ports on the same voyage.

B. *Amicus*, the Chamber of Shipping of British Columbia ("CSBC") is a nonprofit, membership association headquartered in Vancouver, British Columbia, whose geographic service range includes all maritime or saltwater operating areas of that Province. Membership is comprised of approximately 133 maritime companies which own, operate or act as agents for all types of vessels serving British Columbia, including container ships, break bulk vessels, passenger ships, tugs, general cargo vessels, auto carriers, petroleum tankers, etc.

CSBC member companies service or operate vessels that make about 3,000 voyages each year to British Columbia ports, comprising the majority of all cargo vessels calling at those ports. CSBC vessels handle about Can. $60 billion of trade in-bound to consignees in Canada, the United States and elsewhere, or out-bound to foreign ports, primarily in Asia.

Relating specifically to oil carriage, CSBC's members represent the interests of about 140 tank ships, making approximately 500 voyages per year to or from British Columbia via the Strait of Juan de Fuca. Such tank vessels call at the British Columbia ports of greater Vancouver and Kitimat.

CSBC's mission is to liaison with all levels of government, promote growth and trade in British Columbia and seek to reduce or eliminate unnecessary complexities and unreasonable costs of transacting maritime commerce in the Province, while complying with applicable legislation.

The Bilateral Agreement, between the United States and Canada, directs that any sizeable vessel intent on calling on ports in either Puget Sound or southern British Columbia must necessarily first transit "Washington waters," being that portion of the 12-mile wide, 65 mile long, Strait of Juan de Fuca lying south of the mid-channel international boundary. *See* Chartlets attached as Appendices A & B for geographic reference.

Because the State of Washington is claiming authority to regulate any tank vessel transiting its waters even though such vessels otherwise meet all United States,

Canadian or international operational, personnel qualification, drug testing and manning requirements, each association has a vital interest in the outcome of this appeal.

SUMMARY OF ARGUMENT

Amici believe that the Circuit Court erred, in holding that while the non-preemption language in Title I of the Oil Pollution Act of 1990 ("OPA 90") applied only to the provisions of that Act, it was applicable to all of its Titles and, as the most recent federal statutory expression in the field, evidenced the "overarching purposes" of Congress to refrain from preemption in its prior legislation.

Amici argue that certain of the Washington BAP rules going beyond regulation of tanker design, construction and equipment are also preempted by federal law because they frustrate the accomplishment of the full purposes and objectives of Congress, which prior to OPA 90 had established a single national regulatory scheme that is tied to an international regime to which the United States is committed.

Additionally, *Amici* urge that the Washington rules are clearly preempted to the extent that they interfere with rights of innocent passage in United States territorial waters and/or disregard the Bilateral Agreement between the United States and Canada governing vessels transiting United States/Washington and Canadian waters in the Strait of Juan de Fuca, but bound solely for Canadian ports.

ARGUMENT

A. Non-Preemption Language of § 1018 of OPA 90 Has Limited Effect.

Amici agree with Intertanko that § 1018 of OPA 90, 33 U.S.C. § 2718, applies only to Title I of that Act, and is therefore limited in its application to non-preemption of state laws solely concerning oil spill liability, response and penalties. Section 1018 was not intended to apply to the other eight Titles of OPA nor to leave states and political subdivisions free to broadly legislate "prevention provisions," such as those adopted in Washington's BAP rules.

The legislative history supporting this conclusion will no doubt be thoroughly briefed and set forth by Intertanko, and is ably summarized in Judge Grayber's dissent to the Ninth Circuit's denial of Petition for Rehearing reported at *Intertanko v. Locke*, 159 F.3d 1220 (9th Cir. 1998). However, in legislative history not mentioned by the Ninth Circuit, the Legislative Conference Committee announced that it intended the Coast Guard to look to the STCW Convention in setting the manning, training, qualification and watchkeeping standards for foreign tank vessels. Additionally, the Conference Report on OPA expressly states that OPA "does *not* disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 122 (1990) (Emphasis added).

The conclusion that Title I's two non-preemption clauses do not apply to Title IV's prevention provisions is reinforced by the fact that Title IV of OPA 90 contains its

own limited non-preemption clause.[3] *See* § 4202(c) codified at 33 U.S.C., § 1321(o)(2). As Judge Grayber properly concluded, no need for additional non-preemption clauses would exist if the clauses in Title I relied upon by the State were intended to be comprehensive. 159 F.3d at 1222-23.

A final point which has not been emphasized is that the language of the non-preemption clauses of § 1018 allow "any state or *political subdivision thereof*" (emphasis added) to impose additional requirements. There are scores, if not hundreds, of counties, cities and port districts within the State of Washington which are adjacent to navigable waters. An interpretation allowing each of them to enact their own specific, unique and different "prevention" ordinances and rules, under the guise of Title IV of OPA 90, would prove disastrous. It would inevitably lead to conflicts and chaos in the field of tanker regulation and create such a byzantine regulatory scheme as to make it impossible for responsible tanker operators to comply with each "political subdivision's" unique requirements. This could not have been the intent of Congress.

Comparing the effect of the Ninth Circuit's decision in tanker regulation with federal control in the aviation industry, one commentator has stated:

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[3] "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the *discharge of oil* or hazardous substances within any waters within such State, *or with respect to any removal activities related to such discharge.*" (Emphasis added).

> It is scarcely imaginable that state and municipal authorities would be permitted to start dictating aircraft safety and operations standards for airlines calling at various international airports, yet this is precisely what is being done by the State of Washington for maritime tank vessel operations.

Charles Coleman, *Sea Trials: District Court Ruling Alters Balance Between State, Federal Cleanup Roles*, J. Comm., February 3, 1997 at 1.

B. National Regulatory Scheme is Controlling.

By basing all of its non-preemption arguments on the language of § 1018 of OPA 90, the State impliedly concedes that, but for the enactment of that section, prior national legislation and regulations would have preempted its attempt to publish and enforce its BAP rules.

Prior to *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, (1978) (*"Ray"*), federal regulation of tanker safety and environmental protection primarily rested with the Ports and Waterways Safety Act ("PWSA"). Pub. L. No. 92-340, 86 Stat. 424 (1972). The PWSA contained two titles. Title II of the PWSA directed the Secretary [of Transportation] to "prescribe regulations for the design, construction . . . operation, equipping, personnel qualification, and manning" of tank vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." Now codified as 46 U.S.C. § 3703(a). Title II used mandatory language and directed that in developing those standards, the Secretary

must consult with and consider the views of (1) interested federal agencies; (2) officials of State and local governments; (3) representatives of port and harbor authorities and associations; (4) representatives of environmental groups; and (5) other interested parties knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment. 46 U.S.C. § 3703(c).

Each tank vessel of the United States was required to have a certificate of inspection issued and endorsed [by the Secretary] to indicate that the vessel complied with federal regulations prescribed under that Chapter. 46 U.S.C. § 3710(a). Congress provided that each foreign flag tank vessel must have a certificate of compliance issued by the Secretary, but that the Secretary may accept a certificate "issued by the government of a foreign country under a treaty, convention or other international agreement to which the United States is a party," as the basis for his issuance of a certificate of compliance with federal requirements. 46 U.S.C. § 3711(a).

In *Ray, supra,* this court held the State of Washington's attempt to regulate the design of oil tankers was preempted, concluding that by enacting Title II of the PWSA, 46 U.S.C. § 391(a), codified as amended, at 46 U.S.C. § 3701 *et seq.*, Congress had "entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States." 435 U.S. at 163. This Court admonished that, "[t]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevails over the contrary state judgment." *Id.* at 165. It also noted that Congress had

"expressed a preference for international action." *Id.* at 167. At the time of the *Ray* decision, there were no pertinent Coast Guard regulations relating to tug escorts, but the decision emphasized that if the Coast Guard adopted regulatory requirements governing the subject, a state's inconsistent rules would be preempted by operation of the Supremacy Clause. *Id.* at 171-172.

Close examination of *Ray* reveals that this Court's discussion of the Washington tug escort rule characterized that rule as "an operating rule *arising from the peculiarities of local waters* that *call for special precautionary measures.*" *Id.* at 171. (Emphasis added). The contrast to the present case is important. Internal vessel "operating" rules regarding activities such as crew member qualifications, drug and alcohol testing, crew rest periods, ship management systems, mandatory plotting and officer English proficiency, are properly subjects for national rules issued under Title II of the PWSA. By contrast, need for a local harbor pilot in the Port of Philadelphia,[4] and the need to control ballast water in Alaska[5], are not.

Washington BAP regulations are to be measured against a "best available protection" standard and are to be applied throughout *all* Washington waters, including the boundary waters of the Columbia River, the coastal waters of the Pacific Ocean, the boundary waters of the Strait of Juan de Fuca and the inland waters of Puget Sound. These regulations therefore are *not* operating rules

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[4] *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 321 (1851).

[5] *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984).

arising from the "peculiarities of local waters," which *Ray* indicated could withstand preemption. 435 U.S. at 171. The Ninth Circuit's conclusion misreads the claimed basis for the Washington BAP regulations and begs the question of whether the BAP regulations are "in reality based on water depth in Puget Sound or some other local peculiarities," 435 U.S. at 175, or are simply premised upon the non-constitutional foundation that "Washington's navigational waters are treasured environmental and economic resources," as set forth in R.C.W. § 90.56.005(3)(c) and relied upon so heavily in the State's briefing.

Since *Ray*, the subject matters and breadth of tanker vessel regulations and requirements mandated by Congress have expanded dramatically. Approximately, eight months later in 1978, the PWSA was enlarged by the Port and Tanker Safety Act (PTSA) Pub. L. No. 95-474, 92 Stat. 1471 (1978), which largely reissued the PWSA and stipulated further design, equipment, operational, personnel, manning, and training requirements for United States and foreign tankers operating in United States waters. Broad authority was imparted to the Secretary to regulate tankers by the legislation, which states emphatically that the Secretary:

> *shall prescribe* regulations for the design, construction, alteration, repair, maintenance, *operation*, equipping, *personnel qualification and manning* of vessels to which this chapter applies; that may be necessary for increased protection against the hazards to life and property, for navigation and vessel safety and for enhanced protection of the marine environment.

46 U.S.C. § 3703(a) (Emphasis added).

In 1983, Congress enacted Subtitle II of Title 46, United States Code, which codification included existing provisions of Title II of PWSA and detailed the expansive statutory provisions governing marine safety and environmental protection, wherein the Secretary is accorded broad powers of superintendence over the merchant marine and authorized to prescribe regulations to carry out the provisions of the law. 46 U.S.C. § 2103. The Secretary proceeded to do so. Accordingly, it is clear that, under the federal regulatory scheme existing prior to the enactment of OPA 90, Washington's BAP rules, if enacted, would have been preempted and invalid.

The United States and Intertanko have outlined the pervasive federal regulatory structure put in place by the national government as composed of federal statutes, Coast Guard regulations, treaties and executive orders, addressing tanker safety and marine environmental protection, making full repetition here unnecessary. The four principal federal statutes are the Ports and Waterways Safety Act ("PWSA"), the Port and Tanker Safety Act ("PTSA"), the Tank Vessel Act and the Act to Prevent Pollution From Ships.

In 1995, the State of Washington made its BAP Regulations effective, detailing restrictions on the manning, training, operation and personnel qualifications of crewmembers and oil tankers transiting Washington waters. These requirements are accurately summarized in Part I of the Court of Appeals decision, *Intertanko v. Locke*, 148 F.3d 1053, 1057-1058 (9th Cir. 1998). *See also* Appendix K

to Intertanko's Brief on Petition for Certiorari.[6] The State's rules go well beyond national and international requirements, have an extraterritorial impact, contradict treaty obligations, have an adverse effect on foreign relations, and undermine reciprocity with other countries.

Failure to comply with BAP regulations would subject tanker owners to the following: (1) assessment of civil penalties, *see* R.C.W. § 88.46.090; (2) criminal prosecution, *see* R.C.W. § 88.46.080; and (3) denial of entry into state waters, *see* Wash. Admin. Code § 317-21-020.

When the *Intertanko* litigation reached the Ninth Circuit, that Court invalidated Wash. Admin. Code § 317-21-265 requiring certain radar and global positioning system receivers and specialized towing equipment, concluding these requirements were preempted under its reading of *Ray*. However, the Court held that the additional BAP regulations were not preempted because of § 1018 of OPA 90 (33 U.S.C. § 2718). The Court found that the non-preemption language of § 1018 specifically applied only to OPA 90 ("the Act"), but nevertheless concluded that "as the most recent statute in the field," § 1018's savings provisions reflected "the *full* purposes and objectives of Congress better than PWSA, PTSA or the Tank Vessel Act, all of which OPA 90 was designed to complement." (Emphasis added). *Intertanko*, 148 F.3d at 1062.

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[6] That Appendix sets forth a comparison of the federal statutes, regulations and international maritime obligations of the United States with all the BAP regulations to illustrate the relationship and overlap between the federal system and the BAP regulations.

The Court further stated that § 1018 "demonstrates Congress's willingness to permit state efforts in the areas of oil spill prevention, removal, liability and compensation," 148 F.3d at 1062, relying heavily on its earlier decision of *Chevron U.S.A. Inc. v. Hammond*, 726 F.2d at 493, 494 (hereafter "*Hammond.*")

C. *Hammond's* Analysis is Flawed.

One troubling aspect of the Ninth Circuit's decision in *Hammond*, at least for maritime and international law practitioners, is that it ignored the admonition in *Ray* concerning the effect of conflicting federal regulations and concluded that international agreements set only "minimum" standards. 726 F.2d at 493. Hence, Washington or any state would be free to adopt additional requirements. Amici contend the Court misunderstood the Supremacy Clause analysis (U.S. Const. art. VI, cl. 2) for treaties and understated the commitment of Congress and the President to the adoption and enforcement of uniform international standards for merchant vessel safety and vessel-source pollution prevention. By virtue of the supremacy of federal law, "no state can add to or take from the force and effect of [a] treaty." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

Additionally, the Court's decision in *Hammond* failed to recognize the difference between the federal government excepting to specific provisions of a treaty, as a foreign affairs policy choice, and a state government's unilateral enactment of laws that conflict with a treaty which the federal government has ratified and to which it is bound.

D. The United States Must Speak With One Voice.

Power over external affairs is not shared by the states, it is vested in the national government exclusively. *United States v. Pink*, 315 U.S. 203, 233 (1942). This Court has recognized that "in international relations and with respect to foreign intercourse and trade, the people of the United States act through a single government with unified and adequate national power." *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933), *quoted in Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

The reason for requiring this country to speak with one voice in maritime affairs is clear. The result of the Ninth Circuit's *Intertanko* decision could be catastrophic on tanker operators transiting Washington waters to call either at Washington ports or only at ports in British Columbia or Oregon. If upheld, such a ruling will undoubtedly encourage a trend promoting regulatory activism by each coastal state at the expense of international and interstate concerns of uniformity and consistency in shipping and commerce. Such action directly conflicts with the historical position articulated by this Court in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924), which struck down a federal statute granting to injured longshoremen "the rights and remedies under the Workmen's Compensation Law of any state," observing:

> The confusion and difficulty if vessels were compelled to comply with the local statutes at every port are not difficult to see. Of course, some within the States might prefer local rules; but the union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The

> subject is national. Local interests must yield to the common welfare. The constitution is supreme.

Id. at 228.

To the same effect this Court has further stated:

> Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

Hines, 312 U.S. at 63.

The consequences are frightening if this Court should determine that language of § 1018 allowing states to enact laws relating to "substantial threat of discharge" permits enactment of non-federal regulations pertaining to tanker operations, manning, training, drug testing, etc. (the PTSA subject matter) by any "political subdivision thereof." *See* 33 U.S.C. §§ 2718(a) and (c). As mentioned, the State of Washington has scores, if not hundreds, of political subdivisions adjacent to its state waters, all of which could claim the same interest in spill prevention and environmental protection,[7] as now claimed by the State. Of course, the same legislative chaos created by action of Washington's political subdivisions would likewise be threatened by agencies in other coastal states, which is the real danger of such a broad interpretation of OPA 90's non-preemption language.

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[7] *See* Historical Case Law Example, Appendix C.

E. Treaties and International Actions.

1. *General Observations.* The most striking point that emerges from the briefs previously filed by the State and its supporters is the lack of concern for the foreign relations problems raised by the BAP rules. State legislation which affects foreign commerce and foreign relations is subject to stricter scrutiny than are state laws affecting only interstate commerce. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n.7 (1984); *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 7-8 (1986); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 194 (1983) (distinguishing between the "one voice" constraint imposed by the foreign affairs clause and Article VI supremacy "preemption" analysis).

Stricter scrutiny was not supplied by the Ninth Circuit. Rather, the *Intertanko* decision indicates that the court did not examine applicable United States treaties to determine whether they manifested an intent to displace non-uniform state or local laws.[8] By concluding that all relevant congressional purposes and objectives were embodied in OPA 90, and that nothing therein would be frustrated by the BAP regulations, the court avoided the need to properly analyze and consider legislative or foreign policy objectives that Congress and the President have sought to obtain through numerous international

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[8] For example, had the court examined the SOLAS and STCW conventions, it would have found that each limits the extent to which parties to the convention may enact additional laws on the subject.

agreements: the SOLAS, MARPOL, and STCW Conventions, and the various other Treaties on Friendship, Commerce and Navigation, and the LOS Convention.[9]

Instead, the Ninth Circuit cut short its analysis and uncritically applied *Hammond*'s sweeping generalization that international agreements set only "minimum standards," despite critical differences between the underlying treaty provisions involved in this case. It appeared to confuse the question of whether uniform international laws are wise or necessary (a policy question) with whether a treaty to which the U.S. is a party is the Supreme law of the land (an Article VI question).[10]

The difference between the effects of treaties and statutes is critical. Absent an exception or reservation by the President at the time of ratification or accession, or treaty language permitting local variation among political subdivisions of the parties, a treaty presumptively binds the entire nation, or it is not binding at all. *See United States v. Belmont*, 301 U.S. 324, 331 (1936).

2. *Innocent Passage*. Another foreign relations concern involves the internationally recognized doctrine of "innocent passage," by which ships of all countries are free to pass through territorial seas (as opposed to internal waters of coastal nations). While coastal nations may

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[9] *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States* (Part III), 30 J. Mar. L. & Com. 85, 135 (1999).

[10] Allen, *supra*, at 130.

adopt laws related to the preservation of the environment, laws regarding design, construction, equipment and manning of foreign ships are precluded unless they give effect to generally accepted international standards. In various statutory provisions, Congress has explicitly recognized and accepted the internationally recognized innocent passage doctrine which restricts our domestic regulatory powers, but is central to United States Navy operations in foreign territorial waters. *See* 33 U.S.C., § 1223(d); 46 U.S.C. § 3702. The Washington BAP rules contain no exception for vessels in innocent passage.[11]

3. *International Treaties.* Intertanko and the United States substantially rely on four international agreements: SOLAS; MARPOL – 73/78, including its Annex I; STCW and COLREGS. Intertanko Petition for Writ of Certiorari at 8-9, (No. 98-1706). Each has been signed, ratified, executed and implemented by this country, and each is by operation of Article VI of the United States Constitution

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[11] Owners and Masters of vessels transiting through Washington Waters in Innocent Passage or in passage to or from a port in Canada now face two major concerns over the Washington BAP regulation. The first is the potential tort liability that may flow from a failure to comply with applicable state regulations. The tort liability risk arises without regard to whether the State of Washington actually enforced its regulations against such vessels. Second, Washington has made it clear that it intends to enforce its tanker regulations against vessels passing through its waters en route to Canadian ports in British Columbia. Washington's BAP regulation of vessels transiting through U.S./Washington waters en route to British Columbia ports conflict with the U.S./Canada Agreement for Cooperative Vessel Traffic Management System for the Juan de Fuca Region (VTMS Agreement); *See Intertanko,* 148 F.3d at 1064, at n. 9.

"the Supreme law of the land." Under each of these international conventions, our national government has undertaken or acknowledged certain obligations which establish safety standards in such areas as tanker design, construction, equipment, staffing and operations.

The concept of reciprocity is critical in maintaining enforcement of uniform international standards. The United States will accept flag state certification of compliance with requirements concerning such matters as seafarer qualification and training, in exchange for other countries' acceptance and recognition of certification by our federal government that a U.S. vessel complies with the same international standards. United States Petition for Writ of Certiorari at 3 n. 2, (No. 98-1701); *see also* 46 U.S.C. § 3303(a) and 46 U.S.C. § 1903(b). Certification powers lie with the signatory nations which, in this country, is through powers delegated to the United States Coast Guard. Individual states or political subdivisions have no such power, although Washington's BAP regulations purport to be contrary.

The STCW Convention was substantially amended in 1995 to prescribe extensive requirements for officer and crew training, certification, watchstanding practices, rest periods and voyage planning.[12] This Court in *Ray* explained its prior decisions upholding "reasonable, nondiscriminatory conservation and environmental protection measures," noting that none of its earlier cases sustaining the application of state laws to federally licensed

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[12] *See* footnote 8.

or inspected vessels involved an "overlap" between federal and state laws. *Ray*, 435 U.S. at 164.

The overlap between the state BAP regulations and international treaty standards being obvious in this case, it was inevitable that the Ninth Circuit would be called upon to revisit its conclusion in *Hammond*. The overlaps here go far beyond the single ballast water regulation and MARPOL, Annex 1, at issue in *Hammond*. That decision strongly suggested that IMO Conventions set only "minimum standards," which individual states within the United States were free to exceed. However, this Court, in *Ray*, rejected the State's argument that because Title II of the PWSA purported only to establish "minimum" standards, the states were free to enact more stringent requirements concerning tanker construction and design. Instead, this Court held that a state law on the same subject would at least "frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime." *Ray*, 435 U.S. at 165. Nevertheless, the Ninth Circuit, in *Intertanko*, upheld BAP regulations that varied significantly from international requirements prescribed by the STCW Convention and the ISM Code.

The strong implication in *Hammond*, as carried forward by the Ninth Circuit in *Intertanko*, would permit individual states to freely and haphazardly adopt more stringent regulations than those carried forward in various maritime treaties. This threatened the status of those treaties as the controlling law of the land in the United States and came as a shock to other nations. Thirteen

maritime nations[13] and the Commission of the European Community protested the Washington BAP regulations, warning that different regimes in different parts of the United States create uncertainty and confusion for foreign vessels and set an "unwelcome precedent" for other federally-administered nations. *See* Brief for Intervenor-Appellant United States, *Intertanko*, 148 F.3d 1053 (9th Cir. 1998). Where the federal government acting in the unique area of tanker regulation has through treaties, international agreements, plus federal statutes and regulations, crafted a balanced, tailored approach to the issue, any state regulations which threaten to upset that balance are preempted under the Supremacy Clause. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 77 (1st Cir. 1999).

4. *Bilateral Agreement with Canada.* Of more specific concern to the interests of CSBC members are the reciprocal provisions of the 1979 Bilateral Agreement between the United States and Canada. (T.I.A.S. 9706, 32 U.S.T. 377 – The Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region). ("VTMS Agreement"). The United States had long recognized as a matter of international law, a foreign vessel's right of transit passage through international straits, such as the Strait of Juan de Fuca.

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[13] The protesting nations are Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, The Netherlands, Norway, Portugal, Spain and Sweden.

The 1979 VTMS Agreement with Canada governs vessels operating in the Strait of Juan de Fuca, which is the northwest strait that forms the western boundary between the United States and Canada. Among other things, it set vessel traffic lanes and intervening buffer zones, requiring incoming vessels to stay on the United States/Washington side of the mid-channel boundary.[14] *See* 33 U.S.C. § 1230(b). Pursuant to the Congressional grant of authority in the PWSA, the Coast Guard may waive United States requirements for vessels transiting United States waters and bound for Canada if United States vessels are accorded similar treatment while transiting Canadian waters. 33 U.S.C. § 1230(c). Canada has granted reciprocal privileges and, subsequently, each has waived the other's requirements.

The BAP rules contain no exception for vessels in the United States portion of the Strait bound for Canadian ports and clearly conflict with the provisions of the VTMS Agreement.[15] The BAP rules essentially strip Canadian bound vessels of the benefits of the Bilateral Agreement. *Coleman, J. Comm., supra. See also* Hypothetical Incident, Appendix D.

The Ninth Circuit declined to reach the Bilateral Agreement preemption question, indicating that the State had not had the opportunity to develop "the record"

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[14] *See* Chartlets attached as Appendices A & B.

[15] *See* Footnote 11.

concerning whether its BAP regulations conflicted with the Bilateral Agreement.[16]

The government of Canada has strongly protested the application of Washington's BAP rules to international traffic moving through the Strait of Juan de Fuca en route to Canadian ports as violative of the Bilateral Agreement. (T.I.A.S. 9706, 32 U.S.T. 377). Canada's protest that Washington's actions violate the VTMS Agreement certainly presents a foreign relation challenge to the Washington BAP rules. Additionally, the State's action in unilaterally asserting its own BAP regulations initially caused,[17] but hopefully will not continue to encourage, unsafe practices.

The Ninth Circuit's *Intertanko* decision fails to accord the Bilateral Agreement its preemptive effect under Article VI of the Constitution. Even its broad reading of § 1018 of OPA 90 saves laws of the various states and their political subdivisions from preemption only from the conflicting provision of OPA 90. As such, § 1018 cannot save the Washington regulations from preemption

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[16] As Professor Allen stated in the third of a four-part article on merchant vessels appearing in 30 J. Mar. L. & Com., 85, 134 (1999):

> The state's complaint about the need to develop a 'record' seems disingenuous, given the state's announced intent to apply its regulations to all vessels in state waters. . . . The question of whether state action undermines the foreign affairs of the nation is one for the President and Congress, whose judgments are generally binding on the judiciary.

[17] *See* Unsafe Practices Following Adoption of BAP Rules, Appendix E.

by valid U.S. treaties which, no less than federal statutes, are the law of the land.

CONCLUSION

For the foregoing reasons, as well as those stated in the briefs of both the United States of America and Intertanko, Amici, Puget Sound Steamship Operators Association and the Chamber of Shipping of British Columbia, urge that the judgment of the Court of Appeals for the Ninth Circuit should be vacated. This case should be remanded for further proceedings in the District Court to carefully reconsider which of the Washington rules at issue are preempted by federal law.

Respectfully submitted,

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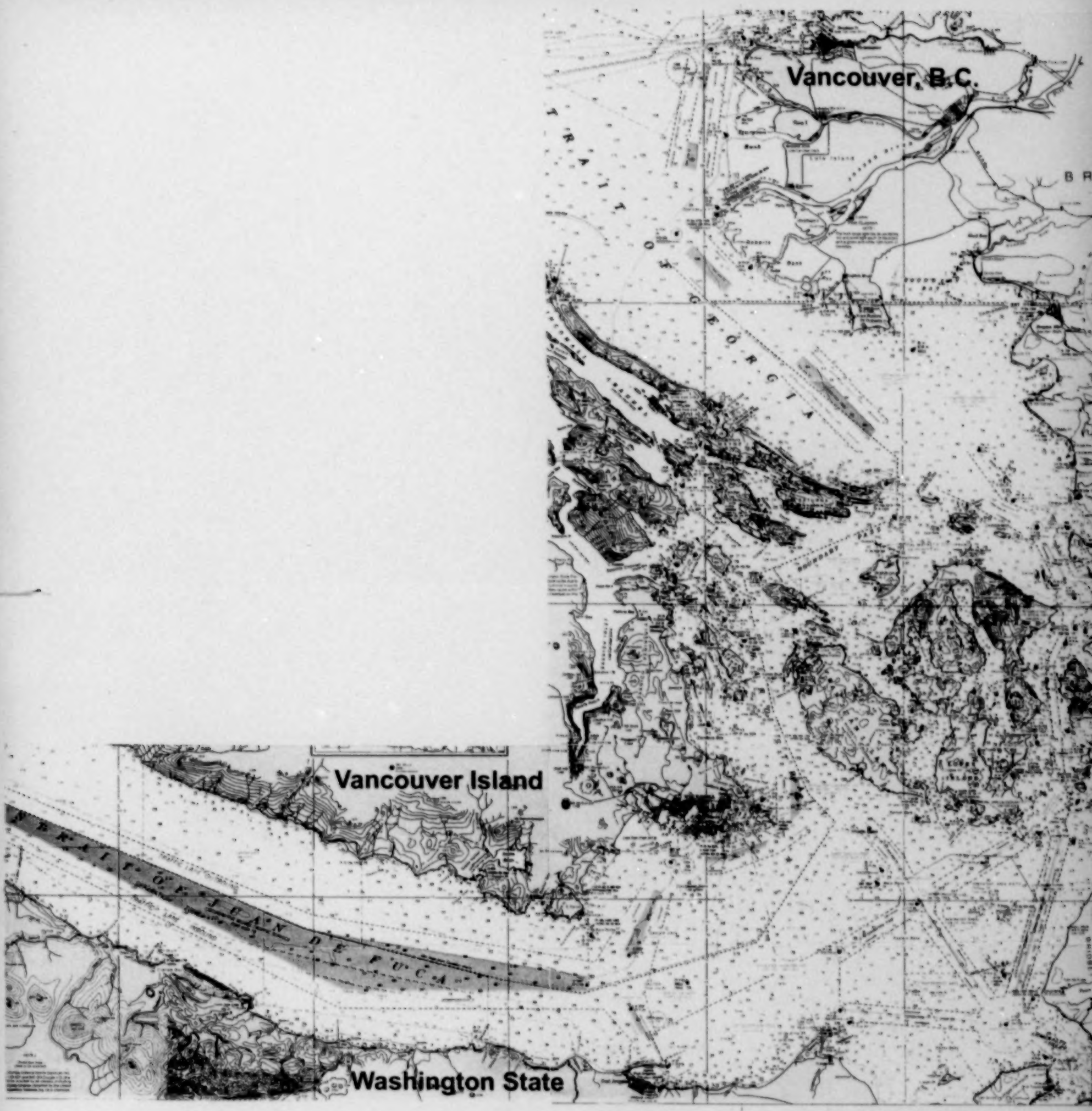
APPENDIX A


Vancouver, B.C.
Vancouver Island
Washington State
STRAIT OF GEORGIA
STRAIT OF JUAN DE FUCA

APPENDIX B


VANCOUVER, B.C.
STRAIT OF GEORGIA
CANADA
UNITED STATES
CHERRY POINT REFINERY
VANCOUVER ISLAND
ANACORTES REFINERIES
STRAIT OF JUAN DE FUCA
WASHINGTON
SEATTLE
TACOMA

APPENDIX C
HISTORICAL CASE LAW INTERFERENCE EXAMPLE

Of local historical interest is the case of *Pacific Northern Oil Corp. v. Jefferson County,* United States District Court for the Western District of Washington, Cause No. C86-114R (1986), with which the author is familiar. Jefferson County, in the northwest corner of the State of Washington, under the guise of protecting against possible pollution damages, issued a Cease and Desist Order against two suppliers of bunker fuel who frequently serviced vessels brought to sheltered anchorage at Port Townsend Bay, Jefferson County, Washington. As authority for its action, the County relied on Washington State's Shoreline Management Act. The County characterized the fueling operations as "undertaking a development or substantial development" and ordered cessation until the suppliers applied for and obtained "a substantial development conditional use or variance permit" from the County Planning Commission.

The fuel companies immediately applied for a Restraining Order. The Memorandum in Support of their application cited preemption by compliance with Coast Guard regulations issued under the Ports and Waterways Safety Act ("PWSA"), plus the invalidity and preemption of the local regulations under the Supremacy and Commerce Clauses of the United States Constitution.

Later, the parties stipulated to certain operating conditions and a Decree was entered by the United States District Judge permitting the fuel companies "to carry out vessel refueling operations . . . without further restraint

or impediment by Jefferson County, upon the signing of the Interim Decree."

APPENDIX D

HYPOTHETICAL INCIDENT – VANCOUVER CALL VIA STRAIT OF JUAN DE FUCA

By way of a hypothetical taken largely from existing experience, consider the following: the "M/T Bergen" flying the Norwegian flag has a length overall of 175 meters and a beam of 26 meters. Its dead weight tonnage is 30,000 and its gross tonnage, 19,000. For the past eight months, the BERGEN has been carrying gasoline from St. Eustatius, Netherlands Antilles, to U.S. ports in California and New York and the Canadian port of Pt. Tupper near Halifax. The BERGEN was inspected by the United States Coast Guard in New York and passed her tank vessel exam with no deficiencies in February 1999. She has a current United States Coast Guard vessel response plan (VRP), as required by OPA 90, and has Geographic Specific Appendices for each Captain of the Port (COTP) zone the ship calls at in the United States.

The BERGEN was last inspected by the Canadian Coast Guard at Pt. Tupper in April 1999 and also passed that exam with no deficiencies. She currently meets all Canadian requirements.

The BERGEN loaded a full cargo of 210,000 barrels of gasoline in the Netherlands Antilles for discharge at Long Beach, California. However, one day before arriving Long Beach, half of the cargo was sold to a consignee in Vancouver, British Columbia, Canada.

Knowing that the BERGEN was already in compliance with U.S. and Canadian regulations, the ship operator directed the vessel to proceed to Vancouver, B.C. from Long Beach to discharge 105,000 barrels at West Ridge

Terminal, Vancouver. The operator contacted the Chamber of Shipping of British Columbia to establish an arrangement with a British Columbia oil spill response organization and notified the BCCS of the vessel's "authorized individual" designated to represent the owner in case of any spill problem, and its insurance underwriter to verify proper coverage. These notifications were in concert with the requirements of the Canada Shipping Act.

The vessel operator and Captain Nødtvedt both knew from prior experience that the U.S. Coast Guard grants "Innocent Passage" for vessels/tankers, and that there is no federal requirement for the vessel to have a geographic specific appendix to the OPA 90 VRP for the Seattle/Puget Sound COTP zone for this Canadian call. Thus, the tanker operator and master, who have not operated in Washington state waters since June 1995, were under the assumption that because all U.S. Coast Guard, Canadian and IMO regulations/guidelines are being met, the operator and this vessel are in complete compliance with applicable regulations.

The BERGEN sails from Long Beach on Friday, October 9, and the ship operator appoints a CSBC member as agent on Saturday. Proper notice of arrival is given. Monday is a U.S. national holiday and Thanksgiving day in British Columbia, and the ship is due to arrive Vancouver on Tuesday, October 12. The Vancouver agent, even if he had reason to check for Washington state compliance, could not do so until Tuesday, when the Washington Department of Ecology returned to work, as DOE is not open on weekends or holidays and they have no 24-hour telephone number.

The BERGEN encounters some periods of limited visibility in the Strait of Juan de Fuca and the Master makes sure that two qualified deck officers are on bridge watch until the vessel arrives at the Victoria, B.C. pilot station to take on a Canadian pilot. Thus, the BERGEN arrives safely at Vancouver at 0500 on Tuesday morning without ever having or knowing that, according to Washington state law, the operator should have had a Washington State prevention plan conforming to its BAP rules on file with the Department of Ecology.

To the operator's amazement, it is later assessed a $50,000 fine for not being in compliance with state rules, and, according to the Washington Department of Ecology, that the omission must be rectified and the fine paid before any of the operator's ships will be allowed in Washington waters.

APPENDIX E

UNSAFE PRACTICES FOLLOWING ADOPTION OF WASHINGTON BAP RULES

Shortly after the July 1, 1995, effective date for the BAP rules, two tankers bound for southern British Columbia ports and fearing they were not in compliance with the Washington rules, decided on a dangerous deviation plan. Instead of approaching through the Strait of Juan de Fuca and Haro Strait, the route for all deep draft vessels, they decided to divert around the north end of Vancouver Island and proceeded south between the eastern side of the island and the mainland. This "all Canadian route" allowed them to avoid Washington waters and approach their destination through the "Inside Passage" on the east side of the island, a notoriously narrow, relatively shallow and extremely hazardous route not utilized by deep draft or heavily laden vessels.

After arrival, when the dangers of this hazardous deviation were analyzed and disseminated, prudent operators refused to duplicate it. The Canadian Government lodged its strong diplomatic protest against the BAP regulations and Washington's breach of the 1979 Bilateral Agreement and the maritime industry is hopeful of favorable results.